No. 16206

IN THE

United States Court of Appeals

For the Ninth Circuit

BLUE MOUNTAIN CONSTRUCTION COMPANY, a Corporation,
Appellant,

vs.

H. C. WERNER and TAUF CHARNESKI,
Appellees.

No. 16206

Appeal from the United States District Court for the District of Oregon

HON. GUS J. SOLOMON, *Judge*

APPELLANT'S BRIEF

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STATEMENT AS TO JURISDICTION

This action was commenced in the Federal Court for the District of Oregon as a diversity case. Diversity jurisdiction existed under Title 28 U.S.C. §1332 because, as alleged in the complaint, the plaintiff is a corporate citizen of the State of Washington, and the defendants H. C. Werner and Tauf Charneski are citizens and residents of the State of Oregon and the City of Eugene therein (Tr. 3).

The amount in controversy, as alleged in the complaint, was $140,989.40 (Tr. 9-10).

A judgment of dismissal of the action with prejudice was entered in the Oregon District Court on August 4, 1958 (Tr. 23). On August 27, 1958 plaintiff/appellant filed a notice of appeal with the District Court of Oregon, the notice being in the manner and within the time provided by Rule 73 of the Federal Rules of Civil Procedure (Tr. 26). On the same day appellant filed the required appeal bond (Tr. 27). The record was docketed in this Court on October 3, 1958 (Tr. 45).

On the foregoing facts, this Court has jurisdiction of this appeal by virtue of Title 28 U. S. Code, §1291, and Rule 73 of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

This appeal involves the single question of whether the district judge abused his discretion in denying plaintiff/appellant's motion for a dismissal of this

action *without* prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure.

This action was commenced by appellant on April 4, 1958 by filing a complaint with the Clerk of the Oregon District Court (Tr. 42). In the complaint appellant sought damages for breaches of three subcontracts under which appellant was to perform certain phases of three prime contracts which defendants/appellees had with the United States government for contruction of irrigation works near Moses Lake, in the Eastern Judicial District of Washington (Tr. 3-10). Coincident with the filing of the complaint, the Clerk placed the matter on the call calendar for May 19, 1958. Service of summons was had on the defendants about April 9, 1958 (Tr. 42).

On April 28, 1958, without any intervening proceedings of any kind, the defendants served and filed an answer (Tr. 42). This answer contained no counter-claim and sought no affirmative relief (Tr. 10-13).

Nothing whatsoever occurred thereafter until the call date, May 19, 1958, at which time counsel for both parties appeared before the Honorable Gus J. Solomon, one of the judges of the Oregon District Court, in accordance with customary practice in that court. At that time, only forty-four days after the action had been commenced, plaintiff/appellant, through one of its attorneys, Lester W. Humphreys, of Portland, Oregon, orally moved the court for a dismissal without prejudice (Tr. 29-31). The attorney for appellees objected, stating as the basis for

the objection that, "We have undertaken at considerable expense to go through this thing and prepare ourselves for our answer and also to prepare ourselves for trial." (Tr. 31). Judge Solomon thereupon said, "The right to be sued in your own community is a valuable right. The motion is denied. The case will be tried in Oregon." (Tr. 31).

Thereupon, on May 23, 1958 plaintiff/appellant, through its primary attorney, Jerome Williams of Spokane, filed a "Motion for Reconsideration of and Renewing Plaintiff's Motion for a Voluntary Dismissal Without Prejudice Pursuant to Rule 41(a)(2)" (Tr. 14-17), This motion was supported by an affidavit setting forth in detail the reasons why the dismissal without prejudice was desired (Tr. 15-17). As the affidavit discloses, appellant desired a dismissal in view of an intention to proceed in the Eastern District of Washington against the defendants and their sureties under the Miller Act (40 U.S.C.A. 270 (a)& (b). The renewed motion for a voluntary dismissal without prejudice was set down for hearing on June 16, 1958 before Judge Solomon. At that hearing no further reasons were advanced by the defendants in opposition to the motion for dismissal (Tr. 32-38). Appellant's counsel, on the other hand, elaborated on the reasons why the dismissal without prejudice was sought, pointing out that it was felt that appellant had a right of action on the payment bond under the Miller Act, which statutory action would afford appellant access to the financial responsibility of the sureties. Appellant further pointed out that an action under the Miller Act could only be brought in

the Federal District Court for the Eastern District of Washington, since the work was performed there, and the Miller Act provides that an action on the payment bond can only be brought in the district where the work was to be performed (Tr. 33-34).

At the hearing of June 16, 1958 Judge Solomon first indicated that the motion to dismiss would be granted, "provided you give defendants assurances in a form satisfactory to them, and if they cannot be satisfied, then you will have to satisfy me, that no such actions as were brought here will be brought against them in the State of Washington." (Tr. 36). Appellant's counsel thereupon endeavored to obtain some clarification from Judge Solomon as to just what he had in mind in this respect, and some further colloquy occurred which terminated in a statement by Judge Solomon that appellant's motion for a dismissal without prejudice would be denied (Tr. 38). The only reason expressed by Judge Solomon for the denial was that, "You have hedged on me. You cannot do that in this court" (Tr. 38).

It should be noted that, in the affidavit in support of the renewed motion for a dismissal without prejudice, it was stated "that affiant is prepared to personally meet such terms as the Court may feel are proper" (Tr. 17). Also, on the June 16th hearing, appellant's counsel stated to the court that "I am personally prepared to meet any damages which your Honor feels are warranted in the situation" (Tr. 34).

Upon denying appellant's motion for the second time, Judge Solomon set the case for pre-trial con-

ference on July 21, 1958 (Tr. 38). Appellant thereupon filed a motion in this court for leave to file a petition for writ of mandamus against Judge Solomon, but said motion was denied by this Court on July 16, 1958 (see Cause No. 16071 of this Court). Immediately upon being advised of the denial, appellant, on July 7, 1958, served and filed in the instant case a notice of its election to stand upon its position that it was entitled to a dismissal without prejudice and of appellant's intention to not proceed further with the action (Tr. 18-19). Thereupon an order was entered by Judge Solomon on August 4, 1958, on appellees' motion, dismissing the action with prejudice (Tr. 23-26). This appeal has been taken from that judgment of dismissal with prejudice.

To further assist the Court, we are summarizing the entire proceedings in this case by the following time table:

April 4, 1958	Action commenced by filing complaint in the Oregon District Court.
April 9, 1958	Defendants served with summons.
April 25, 1958	Defendants served and filed an answer containing no counterclaim and asking no affirmative relief.
May 19, 1958	Call date as established by the Clerk of the District Court when the complaint was filed. On appearance at the call calendar plaintiff/appellant moved for a voluntary dismissal without prejudice. The motion was denied by Judge Solomon.

May 23, 1958	Appellant filed a "Motion for Reconsideration of and Renewing Plaintiff's Motion for a Voluntary Dismissal Without Prejudice Pursuant to Rule 41(a)(2)." Clerk placed this motion on calendar for June 16, 1958.
June 16, 1958	Appellant's renewed motion for a dismissal without prejudice was denied by Judge Solomon. Matter placed on calendar for pre-trial conference on July 21, 1958.
July 3, 1958	Appellant filed with this Court motion for leave to file petition for writ of mandamus against Judge Solomon.
July 16, 1958	Motion for leave to file petition for writ of mandamus was denied by this Court.
July 17, 1958	Appellant gave notice that it would stand upon its motion for a voluntary dismissal without prejudice and that it would proceed no further in this case before the District Court.
Aug. 4, 1958	Action dismissed *with* prejudice upon appellees' motion.

SPECIFICATIONS OF ERROR

1. The District Court Erred in Denying Appellant's Motion and Renewed Motion for a Voluntary Dismissal Without Prejudice pursuant to Rule 41(a)(2) of the Federal Rules of Civil Procedure.

ARGUMENT

Rule 41(a) of the Federal Rules of Civil Procedure provides as follows:

"DISMISSAL OF ACTIONS

"(a) Voluntary Dismissal: Effect Thereof

"(1) *By plaintiff; by Stipulation.* Subject to the provisions of Rule 23(c), and Rule 66, and of any statute of the United States, an action may be dismissed by the plaintiff without order of court (i) by filing a notice of dismissal at any time before service by the adverse party of an answer or of a motion for summary judgment, whichever first occurs, or (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice, except that a notice of dismissal operates as an adjudication upon the merits when filed by a plaintiff who has once dismissed in any court of the United States or of any state an action based on or including the same claim.

"(2) *By Order of Court.* Except as provided in paragraph (1) of this subdivision of this rule, an action shall not be dismissed at the plaintiff's instance save upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon him of the plaintiff's motion to dismiss, the action shall not be dismissed against the defendant's objection unless the counterclaim can remain pending for independent adjudication by the court. Unless otherwise specified in the order, a dismissal under this paragraph is without prejudice."

It is well settled that a district judge can abuse

the discretion vested in him under Rule 41(a)(2), and that the question of whether there has been such an abuse of discretion is reviewable by this Court.

International Shoe Co. v. Cool (8th C.A.), 154 Fed. (2d) 778;

Railroad Co. v. Vardaman (8th C.A.), 181 Fed. (2d) 769;

Westinghouse Elec. Corp. v. Electrical Workers (3rd C.A.), 194 Fed. (2d) 770;

Home Owner's Loan Corp. v. Huffman (8th C.A.), 134 Fed. (2d) 314.

Also, there is ample precedent for the procedure followed by appellant, of standing on its motion for voluntary dismissal and declining to proceed further.

Grivas v. Parmalee Transp. Co. (7th C.A.), 207 Fed. (2d) 334;

U. S. v. Proctor & Gamble Co., 356 U.S. 677, 2 L.ed. (2d) 1077;

U. S. v. Wallace & Tiernan Co., 336 U.S. 793, 93 L.ed. 1042;

Wecker v. Nat'l Enameling Co., 204 U.S. 176, 51 L.ed. 430;

Wilson v. Republic Iron & Steel Co., 257 U.S. 92, 66 L.ed. 144;

Ruff v. Gay (5th C.A.), 67 Fed. (2d) 684.

While we recognize that the grant or denial of a motion for dismissal without prejudice pursuant to Rule 41(a)(2), where an answer has been served, lies within the discretion of the district judge, and that there is no unqualified right to such a dismissal after answer, we do contend that the circumstances here were such that a court, in the true exercise of judicial discretion, could only arrive at one result—the granting of the motion.

It is apparent that there are countless possible situations which can face a district judge under Rule 41(a)(2) and there necessarily must be certain extreme situations where the circumstances so plainly demand a ruling either granting or denying a dismissal motion, that an opposite ruling can only amount to an abuse of discretion. On the one extreme is a case such as this, where utterly no other proceedings have taken place, aside from the early service of a brief answer in the form of a general denial, without any affirmative relief being sought and without any motions, discovery procedures or other proceedings having been initiated. On the other extreme would be the case in which extensive pretrial and discovery procedures had taken place, and where the case had actually gone to trial, and the plaintiff's case had been presented. In the latter type of case, a district court might well abuse its discretion in *granting* a dismissal without prejudice, and the Court of Appeals for the Eighth Circuit, in *International Shoe Co. v. Cool,* 154 Fed. (2d) 778, so found an abuse of discretion under such circumstances. So also in the case at bar, we say that, with the very minimum situation presented here, the district judge abused his discretion in denying the motion, although we can find no case precisely in point.

The Supreme Court of the United States has strongly indicated the underlying principles which should control a district judge in considering such a motion in the case of *Cone v. West Virginia Pulp & Paper Co.,* 330 U. S. 212, 91 L.ed. 849 (1946). There the court said:

"Take the case where a trial court is about to direct a verdict because of failure of proof in a certain aspect of the case. At that time a litigant might know or have reason to believe that he could fill the crucial gap in the evidence. Traditionally, a plaintiff in such a dilemma has an unqualified right, upon payment of costs, to take a non-suit in order to file a new action after further preparation, unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second law suit. (Citing cases.) Rule 41(a)(1) preserves this unqualified right of the plaintiff to a dismissal without prejudice prior to the filing of defendant's answer. And after the filing of an answer, Rule 41(a)(2) still permits a trial court to grant a dismissal without prejudice 'upon such terms and conditions as the court deems proper.'"

See also:

Railroad Co. v. Vardaman (8th C.A.), 181 Fed. (2d) 769;

Home Owners Loan Corp. v. Huffman (8th C.A.), 134 Fed. (2d) 314;

Westinghouse Elec. Corp. v. Electrical Workers (3rd C.A.), 194 Fed. (2d) 770;

Welter v. Dupont Co. (D.C. Minn.), 1 F.R.D. 551.

Barron & Holtzoff on Federal Practice and Procedure, Vol. 2 at §912 of the Pocket Part, says:

"In exercising its discretion the court follows the traditional principle that dismissal should be allowed unless the defendant will suffer some plain legal prejudice other than the mere prospect of a second law suit."

No "plain legal prejudice other than the mere prospect of a second law suit" was shown to the court by the appellees in opposition to this motion. On the

contrary, appellant's motion for reconsideration, with its supporting affidavit, set forth to the court compelling reasons why, in the interests of justice, the motion should be granted, subject to such terms as the court might deem proper (Tr. 15-17). It was pointed out in the affidavit, and orally upon the hearing of the motion for reconsideration (Tr. 33-34), that the appellant had determined to its satisfaction that it had grounds for prosecuting an action under the Miller Act, based upon a claim that the subcontract between appellant and the appellees had been modified so as to entitle appellant to a quantum meruit recovery upon the payment bond for the work and labor performed for the appellees, notwithstanding the contract price, under the authority of cases such as the decision of this Court in *Continental Casualty Co. v. Schaefer,* 173 Fed. (2d) 5.

The complaint in the Oregon action could not be amended so as to bring in the sureties on the payment bond under the Miller Act, because under the specific provisions of that act (40 U.S.C.A. 270 b.) an action on the bond can only be brought in the district "in which the contract was to be performed and executed and not elsewhere," which in this case required the action to be brought in the Eastern District of Washington.

Yet in the face of this utter absence of any showing of prejudice to the appellees, and the showing of compelling reasons why the motion should be granted to afford appellant a clear field to test the valuable rights which it claimed under the Miller Act, and in

the face of a bare minimum situation presented under Rule 41(a)(2), the district judge denied the motion.

As to the reason initially given by the district judge for denying the motion, that "the right to be sued in your own community is a valuable right" (Tr. 31), we submit that that is not a factor proper of consideration in the exercise of the discretion vested in the district court by Rule 41(a)(2). As stated by the Supreme Court in the *Cone* case, supra, the determining factor is ordinarily whether the defendant would suffer some plain legal prejudice other than the mere prospect of a second law suit.

As for the reason expressed by the district judge in denying the motion at the second hearing, that "You have hedged on me. You cannot do that in this court" (Tr. 38), we submit that whether or not an attorney has hedged is not a valid reason for denying justice to the litigant. Furthermore, we are confident that this Court, in reading the record of what occurred, will conclude that there was no "hedging" by appellant's attorney, but only a legitimate effort to determine what the district judge had in mind by the condition he proposed to impose (Tr. 32-38).

If it is to be held that a district judge can deny a motion for a voluntary dismissal without prejudice in the minimum situation here presented, where nothing whatsoever has transpired but the filing of an answer, then Rule 41(a)(2) becomes meaningless, and a district judge can uniformly deny all such motions. That such a result was not intended by the rule mak-

ers seems apparent. The rule obviously contemplates that such motions after answer should ordinarily be granted in those cases where the defendants can be made whole as to any expense or inconvenience by means of the imposition of terms. Here the appellees can be fully restored to their former position by the expedient of terms. On the other hand, the appellees will obtain an unconscionable advantage and the appellant may be in danger of losing valuable rights under the Miller Act by the denial of the motion. In other words, the denial of the motion converts Rule 41(a)(2) into a sword, rather than the simple protective shield it was intended to be. It and the other rules were never intended to be a snare for the unwary, but rather were intended to promote the ends of justice by eliminating the technicalities which often led to unjust results.

Looking at it another way, the rule contemplates situations, after the filing of an answer, where the district judge should grant a dismissal without prejudice, and other situations where he should deny such a motion. There is an inconvenience to any litigant in preparing an answer, but the rule obviously contemplates the granting of dismissals without prejudice despite the inconvenience of preparing an answer. Here, that is the only possible inconvenience which has been suffered by the appellees. The record affirmatively shows that absolutely nothing else has been done by them or their attorneys. In other words, the situation is just barely within the lower boundary of the area covered by Rule 41(a)(2), and just barely beyond the point where appellant could have obtained

a dismissal without prejudice as a matter of absolute right by the filing of a notice under Rule 41(a)(1). As a matter of fact, under Rule 41(a)(1), a plaintiff could have an absolute right to a dismissal without prejudice by simply filing a notice, in situations where vast amounts of discovery procedures have been employed, motions made and other things done, if perchance the defendants had not served an answer.

If a district judge can ever abuse his discretion by the denial of a motion under Rule 41(a)(2), the case at bar must be such a one. No more extreme situation could be conceived. We again refer to the case of *International Shoe Co. v. Cool* (8th C.A.), 154 Fed. (2d) 778, where it was held that there was an abuse of discretion in granting a motion under Rule 41(a)(2), and again say that if there can be an abuse of discretion at that end of the scale, there must of necessity be a similar area for abuse of discretion at the other extreme where this case stands.

As to what constitutes abuse of discretion, this Court has said, in *Bowles v. Quon,* 154 Fed. (2d) 72,

> "An abuse of discretion is a plain error, discretion exercised to an end not justified by the evidence, a judgment that is clearly against the logic and effects of the facts as are found."

The Court of Appeals for the Eighth Circuit, in *Hartford Co. v. Obear Glass Co.,* 95 Fed. (2d) 414, held that an abuse of discretion meant arbitrary action not justifiable in view of the situation and circumstances.

The Court of Appeals for the Seventh Circuit, in *Ryan v. Chatz,* 125 Fed. (2d) 396, held that an abuse

of discretion existed where discretion was not wisely exercised.

The Supreme Court of the United States, in *Burns v. U. S.,* 287 U. S. 216, 77 L.ed. 266, said:

> "Whether there has been an abuse of discretion is to be determined in accordance with familiar principles governing the exercise of judicial discretion. That exercise implies conscientious judgment, not arbitrary action. It takes account of the law and the particular circumstances of the case and is directed by the reason and conscience of the judge to a just result."

CONCLUSION

We earnestly contend that this Court should find an abuse of discretion and should reverse this case and direct the entry of an order of dismissal *without prejudice,* so that appellant may pursue its claimed Miller Act rights free of any controversy as to whether it is barred by a prior judgment. If this Court agrees, then we suggest that it should fix any terms, or at least indicate the nature and limits of the terms to be imposed.

Respectfully submitted,

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